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**IN THE
COURT OF APPEALS OF INDIANA**

ADAM WHITNEY,)	
)	
Appellant-Defendant,)	
)	
vs.)	No. 49A02-0512-CR-1173
)	
STATE OF INDIANA,)	
)	
Appellee-Plaintiff.)	

APPEAL FROM THE MARION SUPERIOR COURT
The Honorable Tanya Walton Pratt, Judge
Cause No. 49G01-0411-MR-211889

August 30, 2006

MEMORANDUM DECISION - NOT FOR PUBLICATION

NAJAM, Judge

STATEMENT OF THE CASE

Adam Whitney appeals from his convictions for Murder, a felony, Robbery, as a Class B felony, and Carrying a Handgun Without a License, as a Class A misdemeanor, following a jury trial. He presents the following issues for our review:

1. Whether the trial court committed fundamental error when it entered judgment on the evidence in favor of Whitney's codefendant on a charge of carrying a handgun without a license.
2. Whether the State presented sufficient evidence to support his convictions.
3. Whether the trial court abused its discretion when it imposed an enhanced sentence.

We affirm in part, reverse in part, and remand with instructions.

FACTS AND PROCEDURAL HISTORY

On October 31, 2004, Whitney and Tony Warren arranged to buy marijuana from Jacob Mecatl. Warren drove Whitney to meet Mecatl. Once they arrived at the designated location, Mecatl sat down in the front passenger seat of Warren's car, and Whitney sat immediately behind Mecatl in a rear passenger seat. Warren got out of the driver's seat and sat next to Whitney in the back seat, and Jairo Ramirez, who was with Mecatl, sat in the driver's seat.

Warren told Ramirez to drive a short distance, and Ramirez complied. Ramirez then stopped the car and got out. Warren also got out of the car and talked to Ramirez. Both men established that the other was not armed with a gun at the time. Warren then got into the driver's seat of the car, and Mecatl told Ramirez that he was uncomfortable with Warren sitting in the driver's seat. When Ramirez relayed that information to

Warren, Warren drove the car away from where Ramirez was standing. After MecatI tried to grab the steering wheel, MecatI was shot three times. Warren and Whitney dumped MecatI's body in a grocery store parking lot located on Pike Plaza Road, drove to a friend's house, and divided the three pounds of marijuana they had stolen from MecatI.

Ramirez subsequently looked at a police photo array and identified Whitney as the man sitting behind MecatI in the car right before the shooting. And Ramirez identified Warren as the driver of that car. An autopsy of MecatI's body revealed that he was shot several times, including shots to the right side of his neck and his right shoulder.

The State charged Whitney with murder, felony murder, robbery, and carrying a handgun without a license. Whitney and Warren were tried together,¹ and at the close of the State's evidence, Warren moved for judgment on the evidence on his carrying a handgun without a license charge. The trial court granted that motion. Thereafter, Whitney testified that Warren was the one who shot MecatI. The trial court instructed the jury in part that the need to render a verdict on the carrying a handgun without a license charge against Warren had been "removed from [the jury's] consideration" and that the jury should "not speculate on the reason for [that] or consider it in [the jury's] consideration of the remaining charges as to either defendant." Appellant's App. at 88. The jury found Whitney guilty as charged. The trial court entered judgment of conviction on the murder, robbery, and carrying a handgun without a license verdicts and sentenced Whitney to sixty years. This appeal ensued.

¹ The State charged each codefendant as the principal and, in the alternative, as an accomplice of the other.

DISCUSSION AND DECISION

Issue One: Judgment on the Evidence

Whitney first contends that the trial court erred when it entered judgment on the evidence against the State on Warren's carrying a handgun without a license charge. In particular, Whitney asserts that as a result of the judgment on the evidence, the trial court "denied [him] due process by negating his defense[, namely, that Warren was the shooter], invading the province of the jury, bolstering the State's case against [him] and shifting the burden of proof." Brief of Appellant at 9. We cannot agree.

Whitney admits that he did not object either to the judgment on the evidence or to the instruction admonishing the jury to disregard the dismissed count against Warren. But Whitney maintains that the judgment on the evidence constitutes fundamental error. The fundamental error exception is extremely narrow. To qualify as fundamental error, "an error must be so prejudicial to the rights of the defendant as to make a fair trial impossible." Willey v. State, 712 N.E.2d 434, 444-45 (Ind. 1999) (citations omitted). Further, the error "must constitute a blatant violation of basic principles, the harm or potential for harm must be substantial, and the resulting error must deny the defendant fundamental due process." Wilson v. State, 514 N.E.2d 282, 284 (Ind. 1987).

Here, again, Warren moved for judgment on the evidence on his carrying a handgun without a license charge at the close of the State's case during trial. The trial court granted that motion. Then, Whitney subsequently testified that Warren shot Mecatl. On appeal, Whitney contends that "[t]he removal of the handgun charge against [Warren] left the jury no other choice but to find [Whitney] as the shooter." Brief of

Appellant at 10. And he asserts that the judgment on the evidence “created the equivalent of a Bruton error.” Id. at 11.

In Bruton v. United States, 391 U.S. 123 (1968), the United States Supreme Court addressed whether the conviction of a defendant at a joint trial should be set aside although the jury was instructed that a codefendant’s confession inculcating the defendant had to be disregarded in determining his guilt or innocence. The court held:

Here the introduction of [the codefendant’s] confession posed a substantial threat to petitioner’s right to confront the witnesses against him, and this is a hazard we cannot ignore. Despite the concededly clear instructions to the jury to disregard [the codefendant’s] inadmissible hearsay evidence inculcating petitioner, in the context of a joint trial we cannot accept limiting instructions as an adequate substitute for petitioner’s constitutional right of cross-examination. The effect is the same as if there had been no instruction at all.

Id. at 137. The court reasoned:

Here [the codefendant’s] oral confessions were in fact testified to, and were therefore actually in evidence. That testimony was legitimate evidence against [the codefendant] and to that extent was properly before the jury during its deliberations. Even greater, then, was the likelihood that the jury would believe [the codefendant] made the statements and that they were true--not just the self-incriminating portions but those implicating petitioner as well. Plainly, the introduction of [the codefendant’s] confession added substantial, perhaps even critical, weight to the Government’s case in a form not subject to cross-examination, since [the codefendant] did not take the stand. Petitioner thus was denied his constitutional right of confrontation.

Id. at 127-28 (emphasis added).

But in this case, we cannot say that the removal of the handgun charge against Warren was the equivalent of introducing testimony that Warren did not shoot Mecatl and denying Whitney the right of cross-examination on that evidence. As the State points out, the jurors were not present during the trial court’s consideration of Warren’s motion

for judgment on the evidence and had no idea why the charge was ultimately removed from their consideration. Further, the trial court instructed the jurors as follows:

The court has removed from your consideration the need to render a verdict on Count IV [the carrying a handgun without a license charge against Warren]. You must not speculate on the reason for this or consider it in your consideration of the remaining charges as to either defendant.

Appellant's App. at 88. We cannot say, as Whitney alleges, that the judgment on the evidence "was the equivalent of a statement from [Warren] saying he did not have a gun." Brief of Appellant at 11. Whitney has not demonstrated that the trial court committed fundamental error when it entered judgment on the evidence on Warren's handgun charge.

Issue Two: Sufficiency of the Evidence

Whitney next contends that the State did not present sufficient evidence to support any of his convictions. When reviewing the claim of sufficiency of the evidence, we do not reweigh the evidence or judge the credibility of the witnesses. Jones v. State, 783 N.E.2d 1132, 1139 (Ind. 2003). We look only to the probative evidence supporting the verdict and the reasonable inferences therein to determine whether a reasonable trier of fact could conclude the defendant was guilty beyond a reasonable doubt. Id. If there is substantial evidence of probative value to support the conviction, it will not be set aside. Id.

Murder

To prove murder, the State was required to show that Whitney knowingly or intentionally shot Mecatl, who died as a result of the gunshot wounds. See Ind. Code § 35-42-1-1. The State presented evidence that Whitney and Warren were the only people

in the car at the time of the shooting. Warren was driving the car, and Whitney was sitting in the back seat directly behind Mecat. Before the shooting, Ramirez observed that Warren did not have a gun in his waistband, and Ramirez did not see any guns in the driver's area of the car when he drove the car a short distance. Whitney is right-handed, and Mecat was shot from close range in the right side of his neck and in his right shoulder. Whitney asserts that the circumstantial evidence is insufficient to prove that he shot and murdered Mecat. But that amounts to a request that we reweigh the evidence, which we will not do. The evidence is sufficient to support his murder conviction.

Robbery

To prove robbery, as a Class B felony, the State was required to show that Whitney, while armed with a handgun, took from the person or presence of Mecat a cell phone and gym bag, putting Mecat in fear or by using or threatening to use force. See Ind. Code § 35-42-5-1. The State presented evidence from which reasonable inferences could be drawn that Whitney shot Mecat and stole his bag containing marijuana, which he later shared with Warren. Again, Whitney's argument on appeal amounts to a request that we reweigh the evidence, which we will not do. The evidence is sufficient to support his robbery conviction.²

Carrying a Handgun Without a License

To prove carrying a handgun without a license, the State was required to show that Whitney did, in a place not his dwelling, property, or fixed place of business, carry a

² Whitney also contends that the State did not satisfy its burden to rebut the evidence that he acted in self-defense. But as the State points out, self-defense is not available as an affirmative defense when one is engaged in the commission of a robbery. Rouster v. State, 705 N.E.2d 999, 1006 (Ind. 1999). Because the jury found that Whitney was engaged in robbery at the time of the shooting, he is barred from asserting self-defense. See id.

handgun on or about his person or in a vehicle without a license therefor. See Ind. Code § 35-47-2-1. Again, the State presented evidence from which a reasonable inference could be drawn that Whitney shot Mecatl while they were both sitting in a car, and Mecatl does not contend that he had a license for the handgun used in the shooting. Whitney contends that the lack of testimony putting a handgun in his hand at the time of the shooting renders the evidence insufficient to support his conviction. We disagree and conclude that the circumstantial evidence is sufficient to support his conviction for carrying a handgun without a license.

Issue Three: Sentence

Whitney next contends that the trial court abused its discretion when it imposed an enhanced sentence for his murder conviction. In particular, he asserts that the trial court violated his Sixth Amendment right to have aggravating factors determined by a jury in violation of Blakely v. Washington, 542 U.S. 296 (2004). And he maintains that the trial court erred when it considered his juvenile adjudications as part of his criminal history. Finally, he contends that his sentence is inappropriate in light of the nature of the offense and his character.

Sentencing decisions lie within the sound discretion of the trial court and are reviewed only for an abuse of that discretion. Powell v. State, 751 N.E.2d 311, 314 (Ind. Ct. App. 2001). If the sentence imposed is authorized by statute, we will not revise or set aside the sentence unless it is inappropriate in light of the nature of the offense and the character of the offender. Ind. Appellate Rule 7(B); McCann v. State, 749 N.E.2d 1116, 1121 (Ind. 2001).

The presumptive sentence for murder is fifty-five years, and the trial court is permitted to add up to ten years for aggravating circumstances.³ Ind. Code § 35-50-2-3. Here, the trial court identified two aggravators, namely: (1) Whitney’s criminal history, which includes two juvenile adjudications, one misdemeanor conviction, and one D felony conviction; and (2) that Whitney was the shooter and not merely an accomplice. The trial court identified a single mitigator, namely, that Whitney’s incarceration would cause an undue hardship on his minor children. The trial court found that the aggravators outweighed the mitigator and imposed an enhanced sentence of sixty years for Whitney’s murder conviction.

Whitney first contends that the trial court erred when it found that he was the shooter and relied on that determination to aggravate his sentence since that fact was not found by a jury, in violation of Blakely. We must agree. Whitney and Warren were tried both as principals and accomplices, and the jury found them each guilty of murder. There is evidence in the record to support a finding that Whitney was the shooter, but the jury did not make that finding.⁴ As such, the trial court’s identification of that aggravator violates Blakely and, therefore, we hold that that aggravator is invalid. See Sullivan v. State, 836 N.E.2d 1031, 1034 (Ind. Ct. App. 2005) (citing Trusley v. State, 829 N.E.2d 923, 925 (Ind. 2005)).

Whitney also asserts that the trial court erred when it “merely recit[ed] the disposition [of his juvenile adjudications] without discussing the facts underlying the

³ Whitney’s offenses in this case occurred before the new advisory sentencing scheme was enacted.

⁴ Indeed, as the Prosecutor expressly stated in closing argument, whether Whitney was the shooter “does not matter” given the jury instruction on accomplice liability. Transcript at 430.

offenses.” Brief of Appellant at 22. But as the State correctly points out, the presentence report adequately sets out the facts underlying Whitney’s juvenile adjudications, which is sufficient. See Jordan v. State, 512 N.E.2d 407, 410 (Ind. 1987) (noting juvenile history detailed in a pre-sentence report filed with the trial court may suffice as evidence of a criminal history, and thus constitute an aggravating circumstance). As such, the trial court did not err when it considered those adjudications as part of his criminal history.

Finally, Whitney contends that his sentence is inappropriate in light of the nature of the offense and his character. Whitney points out that while he and Warren have relatively comparable criminal histories, the trial court imposed a fifty-year sentence for Warren’s conviction based upon the court’s determination that Warren was “not the trigger man.” Transcript at 480. We note, however, that Warren’s criminal history consists of a single juvenile adjudication for possession of cocaine and a misdemeanor conviction for possession of marijuana. In addition, the trial court identified two mitigators on Warren’s behalf: (1) that his incarceration would be a hardship on his dependents; and (2) that he “perform[ed] well while in the jail as a volunteer tutor in the OAR program.” Id.

In contrast, Whitney’s criminal history includes convictions for carrying a handgun without a license and resisting law enforcement, and one of his juvenile adjudications was for battery. And the trial court only identified a single mitigator in sentencing Whitney. Thus, the trial court was justified in imposing a lesser sentence for Warren. But, again, we hold that the trial court erred when it found aggravating its determination that Whitney was the shooter in violation of Blakely. As such, we

conclude that the presumptive sentence of fifty-five years rather than sixty years is appropriate. We reverse and remand to the sentencing court with instructions to issue an amended sentencing order and to issue or make any other documents or docket entries necessary to impose a sentence of fifty-five years without a hearing.⁵

Affirmed in part, reversed in part, and remanded with instructions.

FRIEDLANDER, J., and DARDEN, J., concur.

⁵ Whitney does not challenge the sentences imposed on his other two convictions, which the trial court ordered to run concurrent with his sentence for murder. We instruct the trial court to amend only Whitney's sentence for the murder conviction, and the other sentences are to remain concurrent with that sentence.